Editor's note: 89 I.D. 496

RENEWABLE ENERGY, INC.

IBLA 81-813 Decided September 30, 1982

Appeal from decision of Oregon State Office, Bureau of Land Management, rejecting noncompetitive geothermal resources lease application. OR 26182

Affirmed.

1. Administrative Practice -- Appeals -- Board of Land Appeals -- Rules of Practice: Appeals: Generally -- Rules of Practice: Appeals: Answers -- Rules of Practice: Appeals: Statement of Reasons

   The regulations governing procedures before the Board of Land Appeals provide for the filing of a statement of reasons for appeal by appellant and an answer by an adverse party within certain time limits (subject to extension). Proper practice requires that all issues deemed relevant by the parties be briefed at that time because, as a general rule, the Board does not issue interlocutory decisions on issues which are not dispositive of the appeal.

2. Geothermal Leases: Lands Subject to -- Geothermal Leases: Patented or Entered Lands -- Mineral Lands: Mineral Reservation -- Patents of Public Lands: Reservations -- Taylor Grazing Act: Generally

   A reservation of "all minerals" in a patent of public lands pursuant to sec. 8 of

the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C.A. § 315g (repealed 1976), reserves to the United States geothermal resources underlying the patented lands. The reserved geothermal resources are subject to leasing only under the Geothermal Steam Act, 30 U.S.C. §§ 1001-1025 (1976).

3. Estoppel -- Public Records

Estoppel will not lie against the United States where there is no evidence of an affirmative misrepresentation or an affirmative concealment of a material fact by the Government and the party asserting the estoppel cannot claim ignorance of the true facts because the facts are a matter of public record.

4. Geothermal Leases: Known Geothermal Resources Area -- Geothermal Leases: Noncompetitive Leases

An application for a noncompetitive geothermal resources lease must be rejected if the land sought is within a known geothermal resources area and no evidence has been presented that the KGRA determination was in error.

APPEARANCES: Kathleen M. Kulasza, Esq., and Ted P. Stockmar, Esq., Denver, Colorado, for the appellant; Eugene A. Briggs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Renewable Energy, Inc. (Renewable), has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated May 28, 1981, rejecting its noncompetitive geothermal resources lease application, OR 26182,

for 316.28 acres of land situated in secs. 28 and 33, T. 18 S., R. 45 E., Willamette meridian, Malheur County, Oregon. BLM based its decision on the fact that the land had been determined by the Geological Survey 1/ to be within the Vale Hot Springs known geothermal resources area (KGRA), which is subject to leasing only under the competitive leasing system.

Appellant's lease application was filed on March 26, 1981. Effective December 24, 1970, the land in question was determined to be within the Vale Hot Springs KGRA. 36 FR 5626, 5627 (Mar. 25, 1971).

In its statement of reasons for appeal, appellant disputes the title of the Federal Government to the geothermal resources of the land in question. Appellant contends that the geothermal resources were conveyed in a patent (No. 1227691), dated July 10, 1962, issued pursuant to section 8 of the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C.A. § 315g (repealed 1976), 2/ and subsequently leased by a successor of the patentee to Vale Geothermal Co., Inc. (Vale), a wholly owned subsidiary of Renewable, on February 1, 1977. The patent reserved to the United States "all minerals" in the patented lands (Statement of Reasons at 2). Nevertheless, appellant argues that, in the absence of an authoritative judicial determination, the mineral reservation does not include geothermal resources.

1/ By Secretarial Order No. 3071, dated Jan. 19, 1982, the Secretary of the Interior established the Minerals Management Service (MMS) and transferred to MMS the minerals-related functions of the Conservation Division of the Geological Survey. 47 FR 4751 (Feb. 2, 1982).

2/ Section 8 of the Taylor Grazing Act was repealed, effective Oct. 21, 1976, by the Federal Land Policy and Management Act of 1976. P.L. 94-579, section 705(a), 90 Stat. 2743, 2792.

Appellant recognizes that the court in United States v. Union Oil Co. of California, 549 F.2d 1271 (9th Cir. 1977), cert. denied, 434 U.S. 930 (1978), held that a mineral reservation in a patent issued pursuant to the Stock-Raising Homestead Act, as amended, 43 U.S.C.A. §§ 291-301 (repealed 1976), 3/ included geothermal resources. Appellant, however, argues that Union Oil was "limited solely to issues involving that statute" and that it "did not involve title to geothermal resources in the lands involved herein" (Statement of Reasons at 5, 9). Further, appellant alleges the United States is estopped from claiming title to the geothermal resources and from requiring that a Federal lease be obtained for development of the resources in the lands at issue in this case.

Counsel for BLM, the Regional Solicitor, argues that appellant's contention on appeal is inconsistent with the filing of a geothermal lease application with BLM. Counsel has declined to answer the statement of reasons for appeal on the merits of the issue of ownership of the geothermal resources and the claim of estoppel. The Solicitor contends that these issues are not relevant. However, in the event that the Board deems them relevant, counsel requests further time to answer the allegations on the merits.

[1] The regulations governing rules of practice before the Board, 43 CFR Part 4, make no provision for interlocutory or piecemeal decisions limited only to the resolution of certain issues which are not dispositive

3/ The Stock-Raising Homestead Act was repealed, except as to sections 9 and 11, by the Federal Land Policy and Management Act of 1976, P.L. 94-579, sections 702 and 704, 90 Stat. 2743, 2787, and 2792.

of the case. The regulations provide 30 days from service of the notice of appeal or the statement of reasons within which a party served with the notice who wishes to participate may file an answer to the statement of reasons for appeal. 43 CFR 4.414. An extension of time in which to file an answer may be granted. 43 CFR 4.22(f). There is no provision for extending the time to file an answer conditioned upon whether the Board finds counsel's initial answer to represent an adequate discussion of the issues. All arguments deemed relevant by counsel on appeal should be presented at the time of briefing in order that the Board may have the benefit thereof when it decides the case. 4/ Regrettably, in the present case the Board is deprived of the benefit of the Solicitor's brief on the merits of the issues raised by appellant. However, failure to file an answer will not result in a default. 43 CFR 4.414.

We do not share the view of the Solicitor that the issue of title to the geothermal resources is irrelevant to disposition of this appeal. If appellant's arguments with respect to the issue of title are upheld, the statutory basis for the BLM decision is eliminated.

Section 21(b) of the Geothermal Steam Act of 1970, 30 U.S.C. § 1020(b) (1976), provides, rather broadly, that "[g]eothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced

4/ This applies as well to those cases where respondent on appeal files a motion to dismiss the appeal. Apart from dismissals where the Board has no jurisdiction, dismissals for procedural deficiencies are generally avoided except where to do so would prejudice an innocent party or cause great problems with efficient operation of the appeals procedures. When the Board declines to dismiss an appeal, it generally does so in the context of a decision on the merits rather than in a separate interlocutory order.

except under geothermal leases made pursuant to this chapter." (Emphasis added.) Section 1020(b) further provides:

> If the Secretary of the Interior finds that such development is imminent, or that production from a well heretofore drilled on such lands is imminent, he shall so report to the Attorney General, and the Attorney General is authorized and directed to institute an appropriate proceeding in the United States district court of the district in which such lands are located, to quiet the title of the United States in such resources, and if the court determines that the reservation of minerals to the United States in the lands involved included the geothermal resources, to enjoin their production otherwise than under the terms of this chapter: Provided, That upon an authoritative judicial determination that Federal mineral reservation does not include geothermal steam and associated geothermal resources the duties of the Secretary of the Interior to report and of the Attorney General to institute proceedings, as hereinbefore set forth, shall cease. [Emphasis in original.]

It is, essentially, appellant's argument that a quiet title action must be instituted in every case where land has been patented with a reservation of minerals to the United States, in order to properly resolve the question of ownership of the geothermal resources. We disagree. The legislative history of section 21(b) of the Geothermal Steam Act of 1970 indicates that Congress contemplated a test case:

> In order to obtain an authoritative judicial determination of the ownership of geothermal resources in lands the surface of which has passed from Federal ownership with a reservation of minerals to the United States, a new section 20(b) was adopted by the committee. This directs the Attorney General to initiate an appropriate proceeding to quiet the title of the United States to such resources if and when development of such resources occurs or is imminent. The committee is aware that the Department of the Interior has expressed the view that geothermal steam is not subject to the mineral reservation of the Stockraising Homestead Act of December 29, [1916]. The committee is also aware that a contrary view has been expressed. As the opinion of the Department is not a conclusive determination of the legal question, it was the sense of the committee that an early judicial determination

> of this question (upon which the committee takes no position) is necessary. At issue is the ownership of geothermal steam on more than 35 million acres of land, the surface of which has passed from Federal ownership but with a reservation of minerals to the United States. The bulk of this acreage was patented under provisions of the Stockraising Homestead Act, and the reserved minerals therein are subject to disposition under appropriate mineral laws. It is not the intent of the committee that this direction to initiate a proceeding in a U.S. district court shall constitute a continuing obligation upon the Attorney General but merely that an authoritative judicial determination be obtained that the mineral reservation of the Stockraising Homestead Act, and similar acts, does or does not reserve to the United States the geothermal steam. The development of geothermal resources in these lands will be retarded until the question of ownership is determined. [Emphasis added.]

H.R. Rep. No. 91-1544, 91st Cong., 2d Sess. 3, reprinted in 1970, U.S. Code Cong. & Ad. News 5113, 5119-20.

The initial issue raised is whether the reservation of "all minerals" in a patent under section 8 of the Taylor Grazing Act embraces geothermal resources. Inherent in this issue is the question of whether the reservation is sufficiently similar to the reservation of minerals under section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976), to be governed by the judicial determination in Union Oil Co. of California, 549 F.2d at 1271, that the reservation under the latter act embraces geothermal resources. We believe that Union Oil, is the judicial determination Congress contemplated and is dispositive of the question of ownership of geothermal resources where land has been patented under section 8 of the Taylor Grazing Act with a reservation of all minerals to the United States. Cf. Energy Partners, 21 IBLA 352 (1975) (adjudication of geothermal resources lease applications deferred where the land had been patented both under the Stock-Raising Homestead Act and section 8 of the Taylor Grazing Act, pending a final determination in Union Oil as to ownership of the geothermal resources).

[2] Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1976), provides that patents issued under the Act are "subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." In addition, any person who has acquired the right to mine and remove reserved minerals "may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals," subject to the duty to provide for compensation of the patentee for "damages to crops or other tangible improvements." Id. Similarly, section 8 of the Taylor Grazing Act provides for patent of lands with a reservation of minerals to the United States. In addition, the latter statute provides:

> Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon.

43 U.S.C.A. § 315(g)(d) (repealed 1976).

As the Ninth Circuit Court of Appeals recognized in its decision in Union Oil, starting in 1909, Congress instituted a policy of separating the surface estate from the right to the underlying minerals in statutes providing for patents of public lands in order to allow development of the surface

estate while preserving control of the United States over minerals. Union Oil Co. of California, 549 F.2d at 1275. Both section 9 of the Stock-Raising Homestead Act (1916) and section 8 of the Taylor Grazing Act (1934) follow in that tradition. 1 American Law of Mining §§ 3.24F, 3.24K, at 541, 544 (1981). As is evident from reading the language of the two Acts, the patentee, as owner of the surface estate, is distinguished from the person who has the right to mine and remove minerals under the mineral reservation. The former is protected in both instances by a requirement that he be compensated for any damage to the land or improvements thereon. It would appear from the language of section 8 that Congress authorized exchanges of public lands for private lands in the belief that such exchanges would in some cases serve both the public and the private interests and that provision for reservation of the mineral estate was made to preclude concern over loss of mineral values from inhibiting such exchanges.

The concept that the surface and mineral estates are intended to be separate in patents of public lands with a mineral reservation to the United States has given rise to a rule of construction in interpreting the scope of a mineral reservation, i.e., a "reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have separate value." 1 American Law of Mining § 3.26 at 552 (1981). There is no doubt that geothermal resources are mineral substances which can be taken from the soil and which have separate value. See Union Oil Co. of California, 549 F.2d at 1279; Olpin, The Law of Geothermal Resources, 14 Rocky Mountain Mineral Law Institute 123, 140-41 (1968). Accordingly, such resources are included in a mineral reservation under section 8 of the Taylor Grazing Act. This holding is consistent with the

position taken by the Solicitor that geothermal resources are not locatable under the General Mining Law or leasable under the Mineral Lands Leasing Act of 1920. Geothermal Leasing in Designated Wilderness Areas, Solicitor's Opinion, M-36937, 88 I.D. 813 (1981). This memorandum recognized that the court in Union Oil Co. of California found geothermal resources to be included in the reservation of "all the coal and other minerals" under the Stock-Raising Homestead Act patents.

[3] Appellant's second argument is that the United States is estopped "from claiming title to the geothermal resources in the Lands and from requiring that a federal lease be obtained for development of the resources" (Statement of Reasons at 6). Appellant relies on the four elements necessary for an estoppel, outlined in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970):

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Appellant explains that since 1977, it has conducted exploration and development operations pursuant to the private lease. These operations have included the land in question. In addition, appellant has begun development of an industrial park, to be used in conjunction with the production of geothermal resources. Total expenditures have amounted to $277,413. There is no indication of the extent of expenditures for operations on the land subject to the Federal mineral reservation as opposed to the other acreage embraced in the private lease. In the spring of 1977, appellant informed BLM officials at

the Vale District Office of its operations on and proposed development of the land in question. See Affidavit of Stephen M. Munson, President, Renewable, dated July 30, 1981. Finally, appellant has obtained a United States Department of Energy grant for development of the industrial park.

Appellant argues that estoppel can be based on a failure to act where the party to be estopped has a "duty to speak." United States v. Georgia-Pacific Co., supra at 97. Appellant contends that section 21(b) of the Geothermal Steam Act imposes a duty on the Secretary to request an action to quiet title to geothermal resources in lands patented with a mineral reservation to the United States, where development is "imminent." Appellant points out that development of the land in question is, indeed, imminent. Appellant contends that despite all of appellant's actions, and with knowledge thereof, the Secretary has failed either to request a quiet title action or to bring suit for trespass. Appellant alleges reliance on the Secretary's conduct to its detriment.

Several factors preclude a finding of estoppel in the present situation. First, we can find no duty of the Secretary under section 21(b) of the Geothermal Steam Act to request an action to quiet title to the geothermal resources involved herein. The case of Union Oil Co. of California, 549 F.2d at 1271, resolved the question of title to such resources where land had been patented with a reservation of all minerals to the United States as under section 8 of the Taylor Grazing Act. Further, appellant has presented no evidence of any representation by BLM employees that the United States did not have title to the geothermal resources of the land in question or that appellant need not seek a Federal lease if it sought to develop those

resources. We can find neither an "affirmative misrepresentation" nor an "affirmative concealment of a material fact" required to establish estoppel. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); see Schweiker v. Hansen, 450 U.S. 785 (1981).

Furthermore, appellant was not "ignorant of the true facts," i.e., that title to the geothermal resources is in the United States, at the time it undertook its program of exploration and development (1977). As noted above, the Department published notice that the land was determined to be within the Vale Hot Springs KGRA in the Federal Register (36 FR 5626, 5627 (Mar. 25, 1971)), effective December 24, 1970. Accordingly, appellant is deemed to have had notice that the United States asserted title to the geothermal resources at least as of the date of publication in the Federal Register. See 44 U.S.C. § 1507 (1976). Further, the BLM land status plat, a matter of public record available for inspection, clearly shows the land to be patented with a reservation of minerals to the United States. Accordingly, there could be no reasonable reliance by appellant upon the fact that BLM failed to file an action of trespass or ejectment to quiet title. Therefore, any exploration or development activities undertaken by appellant were done at its own risk. See Gary Willis, 56 IBLA 217, 223 (1981).

Finally, appellant argues that equity dictates that it be declared the holder of a "preference right," similar to the rights provided for by section 4 of the Geothermal Steam Act, 30 U.S.C. § 1003 (1976). Section 4 provides that certain persons will be permitted to convert their mineral leases, permits or mining claims under certain circumstances to competitive geothermal leases upon "payment of an amount equal to the highest bona fide bid[s]"

for the leases, within 30 days after notification of the bids. 30 U.S.C. § 1003(f) (1976). However, such a right was limited to the holders of valid mineral leases or permits or mining claims as of September 7, 1965, or their successors-in-interest and had to be exercised within 180 days of December 24, 1970. 30 U.S.C. § 1003(a) (1976). There is no question that appellant does not qualify under section 4 of the Geothermal Steam Act for a preference right. Moreover, we can discern no statutory authority which would permit us to invoke a preference right in favor of appellant.

[4] Having determined that the United States has title to the geothermal resources of the land in question, such resources must be developed or produced under Federal geothermal leases. 30 U.S.C. § 1020(b) (1976). It is well established that lands within a KGRA may only be leased by competitive bidding. 30 U.S.C. § 1003 (1976); 43 CFR 3210.4, 3220.1. Therefore, an application for a noncompetitive geothermal lease must be rejected if the land is within a KGRA. Marvin L. McGahey, 50 IBLA 4 (1980). Appellant has presented no evidence that the Vale Hot Springs KGRA determination was in error.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Gail M. Frazier
Administrative Judge